RECORD
AND
BRIEFS

No. 16-348

In the Supreme Court of the United States

MIDLAND FUNDING, LLC, PETITIONER

v.

ALEIDA JOHNSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

This case directly implicates two circuit conflicts concerning the interaction of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692 *et seq.*, and the Bankruptcy Code.

In *Crawford* v. *LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014), cert. denied, 135 S. Ct. 1844 (2015), in the context of a Chapter 13 bankruptcy, the Eleventh Circuit held that filing a proof of claim on a knowingly time-barred debt violates the FDCPA. That holding has given rise to a square and entrenched circuit conflict, and it has sharply divided panels on multiple courts of appeals.

In the decision below, the Eleventh Circuit reaffirmed *Crawford*, while also holding (in direct conflict with the Ninth Circuit and in clear tension with the Second Circuit) that the FDCPA claim found viable in *Crawford* was not impliedly repealed by the Bankruptcy Code. These same issues have hopelessly divided scores of district and bankruptcy courts nationwide, and the issues affect hundreds (if not thousands) of cases implicating potentially billions of dollars annually.

The questions presented are:

1. Whether filing a proof of claim on a knowingly time-barred debt violates the FDCPA.

2. Whether any such claim under the FDCPA is impliedly repealed by the Bankruptcy Code.

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BRIEF FOR THE RESPONDENT

This case implicates two "closely related" questions (Pet. 9) of exceptional legal and practical importance that have openly divided the courts of appeals. As respondent will explain upon plenary review, the Eleventh Circuit's disposition of each question was correct. But in light of the clear circuit conflict, the issue's obvious significance, and the urgent need for this Court's guidance, respondent agrees with petitioner that review is plainly warranted.

There is also a pending petition for a writ of certiorari in *Owens* v. *LVNV Funding, LLC*, No. 16-315 (filed Aug. 26, 2016), which arises on materially indistinguishable facts and presents the same opportunity to address the common questions presented here. The Court should grant review in this case or in *Owens*, and hold the other petition pending the conclusion of this Court's review.

ARGUMENT

A. There Is A Clear And Intractable Circuit Conflict On Each Question Presented

In its decision below, the court of appeals correctly held that petitioner's conduct violates the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692 *et seq.*, and that respondent's FDCPA claim is not precluded by the Bankruptcy Code. As petitioner explained, the courts of appeals have sharply divided over these issues (Pet. 10-16), and the conflict warrants this Court's immediate intervention.

1. It is undisputed that "[t]here is a circuit split on the issue of whether filing a proof of claim on a stale debt in bankruptcy" violates the FDCPA. *Owens* v. *LVNV Funding, LLC*, ___ F.3d ___, 2016 WL 4207965, at *5 (7th Cir. Aug. 10, 2016), petition for cert. pending, No. 16-315 (filed Aug. 26, 2016). The Eleventh Circuit has now twice held that such conduct violates the FDCPA as "'unfair,' 'unconscionable,' 'deceptive,' and 'misleading' within the broad scope of § 1692e and § 1692f." *Crawford* v. *LVNV Funding, LLC*, 758 F.3d 1254, 1260 (11th Cir. 2014), cert. denied, 135 S. Ct. 1844 (2015); Pet. App. 9a ("a debt collector violates the FDCPA by filing a knowingly time-barred proof of claim in a Chapter 13 bankruptcy proceeding").

Three other circuits—two by sharply divided panels—have expressly rejected the Eleventh Circuit's holding. See *Dubois* v. *Atlas Acquisitions LLC (In re Dubois)*, ___ F.3d ___, 2016 WL 4474156, at *6 & n.6 (4th Cir. Aug. 25, 2016) ("The Eleventh Circuit in *Crawford* is the only court of appeals to hold that filing a proof of claim on a time-barred debt in a Chapter 13 proceeding violates the FDCPA."); *Owens*, 2016 WL 4207965, at *5-*6 ("Like the Eighth Circuit, we decline to follow the

Eleventh Circuit's approach."); *Nelson* v. *Midland Credit Mgmt., Inc.*, ___ F.3d ___, 2016 WL 3672073, at *2 (8th Cir. July 11, 2016) (refusing to "follow the Eleventh Circuit" and "reject[ing] extending the FDCPA to time-barred proofs of claim"); see also *Dubois*, 2016 WL 4474156, at *9 (Diaz, J., dissenting) (following *Crawford* and rejecting *Nelson* as "[un]persua[sive]"); *Owens*, 2016 WL 4207965, at *10 (Wood, C.J., dissenting) ("I would align this court with the Eleventh Circuit, rather than the Second and Eighth") (citations omitted).

This conflict is both express and intractable. Within the past month, two circuits—the Eleventh and Eighth—have refused to reconsider their positions, each denying rehearing en banc (without a *single* judge requesting a vote) even after contrary circuit authority was explicitly called to the full court's attention. There accordingly is no point in further percolation: given the "existing circuit split," remaining circuits "need only to line up on one side or the other." *Owens*, 2016 WL 4207965, at *10 (Wood, C.J., dissenting). The conflict is clear and entrenched, and it merits the Court's review.

2. In the decision below, the Eleventh Circuit also held that "[t]he Bankruptcy Code does not preclude an FDCPA claim in the context of a Chapter 13 bankruptcy when a debt collector files a proof of claim it knows to be time-barred." Pet. App. 7a ("answer[ing] the question left open in *Crawford*"). This separate holding conflicts with settled law in the Ninth Circuit, and it is incompatible with established precedent in the Second Circuit.

a. While the Eleventh Circuit (correctly) held that "the Code and the FDCPA can be read together in a coherent way," the Ninth Circuit reached precisely the opposite conclusion in *Walls* v. *Wells Fargo Bank, N.A.*, 276 F.3d 502 (9th Cir. 2002). In *Walls*, the Ninth Circuit adopted the sweeping theory that the FDCPA is cate-

gorically "precluded" in the bankruptcy setting. 276 F.3d at 510-511. According to *Walls*, "'[a] mere browse through the complex, detailed, and comprehensive provisions of the lengthy Bankruptcy Code * * * demonstrates Congress's intent to create a whole system under federal control which is designed to bring together and adjust all of the rights and duties of creditors and embarrassed debtors alike.'" *Id.* at 510 (quoting *MSR Exploration, Ltd.* v. *Meridian Oil Inc.*, 74 F.3d 910, 914 (9th Cir. 1996)). *Walls* found that "[w]hile the FDCPA's purpose is to avoid bankruptcy, if bankruptcy nevertheless occurs, the debtor's protection and remedy remain under the Bankruptcy Code." *Ibid.* It thus held that any remedy for bankruptcy-related misconduct "lies in the Bankruptcy Code," and "[n]othing in either Act persuades us that Congress intended to allow debtors to bypass the Code's remedial scheme when it enacted the FDCPA." *Id.* at 510-511.[1]

Although *Walls* involved a different FDCPA claim—an alleged violation of the Code's discharge injunction—its categorical holding would be dispositive in this factual context: because *any* FDCPA claim arising in the bankruptcy setting is "precluded" under *Walls*, respondent's FDCPA claim would automatically be precluded as well. And, indeed, that was the precise conclusion reached by the Ninth Circuit's Bankruptcy Appellate Panel: "Application of the FDCPA to this conduct"—"B-Real's act of

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[1] *Walls*'s categorical holding itself has squarely divided the courts of appeals, reflecting the broad confusion these issues have generated at the circuit level. See, *e.g.*, *Randolph* v. *IMBS, Inc.*, 368 F.3d 726, 730-733 (7th Cir. 2004) ("[t]he Bankruptcy Code of 1986 does not work an implied repeal of the FDCPA"); *Simon* v. *FIA Card Servs., N.A.*, 732 F.3d 259, 273-274 (3d Cir. 2013) (rejecting *Walls* and "follow[ing] the Seventh Circuit's approach").

filing a [time-barred] proof of claim in the pending bankruptcy case"—"would certainly conflict with the Code." *B-Real, LLC* v. *Chaussee (In re Chaussee)*, 399 B.R. 225, 237 (B.A.P. 9th Cir. 2008); see also *id.* at 214 ("we are convinced that the Code and Rules are up to the task of compensating a debtor for any damages or costs occasioned by, and to punish and deter, those who would abuse the bankruptcy claims process"). As *Chaussee* found, "we believe *Walls* compels our holding that Debtor's claim against B-Real under FDCPA is precluded by the Code." *Id.* at 241.[2]

b. In *Simmons* v. *Roundup Funding, LLC*, 622 F.3d 93 (2d Cir. 2010), the Second Circuit held that an "inflated" proof of claim "cannot form the basis for a claim under the FDCPA," reasoning that the claims-process is controlled exclusively by the Code. 622 F.3d at 94-96. While *Simmons* did not confront the identical conduct at issue here—a scheme to flood bankruptcy courts with knowingly time-barred claims—its logic is incompatible with the Eleventh Circuit's decision, and it would effectively foreclose respondent's claim in the Second Circuit.[3]

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[2] This Court routinely considers decisions of bankruptcy appellate panels in describing conflicts warranting the Court's review. See, *e.g.*, *Schwab* v. *Reilly*, 130 S. Ct. 2652, 2659 & n.4 (2010).

[3] Petitioner discusses *Simmons* in explaining the split on the first question presented (Pet. 13), but *Simmons* is best understood as relevant to the second question (*i.e.*, whether the Code impliedly repealed the FDCPA in this context). *Simmons* relied directly on "preclusion" case law (including *Walls*), and invoked a preclusion-based rationale (*e.g.*, refusing to "supplement the remedies afforded by bankruptcy itself"). 622 F.3d at 96-97. While the Second Circuit later suggested that *Simmons* did not find an "implied[] repeal," it also admitted that *Simmons* "construe[d] FDCPA provisions to be inapplicable when invoked for claims made during bankruptcy" and found FDCPA claims "preclu[ded] * * * prior to discharge." *Gar-*

In sum, it is beyond clear that the outcome below would have been exactly the opposite had this case arisen in the Ninth or Second Circuits. The split on this second question is not as dramatic as the split on the first question, but the conflict is still persistent and unequivocal. This issue has been exhaustively developed by the Eleventh Circuit and district court in this case, and it has been extensively addressed in the lower courts. See, *e.g.*, Pet. 15-16, 19. It reflects the same degree of intolerable confusion over an exceedingly important question of federal law, and there is no basis for thinking the split will resolve itself. This question, like the first question, warrants the Court's review.[4]

B. The Questions Presented Are Exceptionally Important And Frequently Recurring

As explained in this petition (at 16-18) and the *Owens* petition (at 17-18 & nn.6-7, 29-31), the questions presented are of extraordinary legal and practical significance. Petitioner's scheme has produced a "deluge" of claims "swe[eping] through the U.S. bankruptcy courts." *Crawford*, 758 F.3d at 1256. This scenario now arises "all the time": "The issue is a real one, the problem is wide-

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field v. *Ocwen Loan Servicing, LLC*, 811 F.3d 86, 90-91 (2d Cir. 2016). *Simmons* is most naturally understood as holding (incorrectly) that the Code precludes the FDCPA in this context.

[4] As noted at the outset, respondent will address the merits of these issues at the merits stage. As part of that presentation, respondent, for example, will explain why petitioner's claims are not truly "'accurate and complete'" (Pet. 11)—despite disclosing truthful information on their face—as "they are mum about the unenforceability of the debt" (*Owens*, 2016 WL 4207965, at *10 (Wood, C.J., dissenting)). And respondent will also explain why petitioner's knowingly time-barred claims are *not* "allowed by the Bankruptcy Code" (Pet. 17).

spread, and it burdens both debtors and the courts." *Jenkins* v. *Genesis Fin. Solutions, LLC (In re Jenkins)*, 456 B.R. 236, 239 n.2, 241 (Bankr. E.D.N.C. 2011). It arises in countless Chapter 13 bankruptcies, implicating potentially billions of dollars of debt. See No. 16-315 Pet. 29-30. And in light of the deep conflict, parties on all sides lack notice of their rights, frustrating the efficient administration of bankruptcy cases nationwide.

This Court rarely permits even shallow conflicts to persist in the bankruptcy context. See Pet. 18 (citing cases). There are compelling reasons to resolve these significant disputes now.

C. Both This Case And *Owens* Are Excellent Vehicles For Considering The Questions Presented

Even though the Eleventh Circuit resolved both questions correctly, this case still presents a highly suitable vehicle for resolving these important questions.

As in *Owens*, every material fact here is undisputed, and it presents the quintessential fact-pattern dividing the courts nationwide. The case was resolved on the pleadings, turning on pure questions of law. Each question was squarely resolved after the courts were presented with the full range of arguments. And the court of appeals resolved *both* questions, which (as petitioner explained) are ideally addressed in tandem.[5]

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[5] While respondent agrees that the Court should grant and resolve both "closely related" questions (Pet. 18-19), given the expansive confusion on the first question presented, there would still be significant value to resolving that question now, even if the Court elects to let the second question percolate. As described above, however, additional percolation is neither necessary nor useful: the split between the Eleventh Circuit and the Second and Ninth Circuits is clear and intractable, and the broader issues have been extensively treated in their own right (in light of the related conflict over *Walls*'s

The Court could also instead grant review in *Owens*, where the same questions are factually presented. While the *Owens* petition did not raise the second question presented (*i.e.*, whether the Code impliedly repealed the FDCPA in this setting), the issue was raised by the *Owens* respondents in district court (see, *e.g.*, No. 16-315 Pet. App. 65a), and the *Owens* petitioners explicitly invited the Seventh Circuit to resolve it on appeal (C.A. Reply Br. 29-31 ("To avoid confusion on any remand, the Court should address this issue and reaffirm that there is no preclusion under the controlling standard.")). There is no clear obstacle to the Court adding the second question as an alternative ground supporting affirmance.

Whether the Court grants review in this case or *Owens*, however, review is appropriate now: the division among the lower courts is staggering, and the resulting confusion is intolerable. These issues have been exhaustively addressed—including by multiple split panels—and both *Owens* and *Johnson* present excellent vehicles for resolving these questions. There is no point in waiting to see how other circuits line up on the existing circuit conflicts.

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categorical holding, see p. 4 n.1, *supra*). Further percolation will only add more confusion; there is no reason to believe it will somehow clear up the existing conflicts.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition in *Owens* should be granted and this case should be held pending *Owens*'s disposition.

Respectfully submitted.

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